

In Defense of the Corpus Delicti Rule

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The common law corpus delicti rule prohibits the admission of an extrajudicial confession into evidence in a criminal case unless the prosecution introduces some evidence independent of the confession that the crime described in the confession actually occurred. This venerable rule, designed to prevent the conviction of the coerced and the mentally unstable for fictitious crimes, has come under increasing scholarly criticism in the past fifty years, and a small but growing number of jurisdictions have repealed the rule.

The author argues that the corpus delicti rule is worth retaining because it serves its purpose of preventing wrongful convictions in that small class of cases in which there is not independent evidence of criminality. Using a recent case from Michigan, the author demonstrates that more modern confession doctrines, such as due process voluntariness and Miranda, cannot adequately protect against such wrongful convictions, especially since the Supreme Court has held that these doctrines are not designed to prevent the admission of unreliable confessions.

I. INTRODUCTION

The common law corpus delicti rule prohibits the introduction of an extrajudicial confession in a criminal case unless the prosecution introduces independent evidence of the "corpus delicti."¹ That is, the prosecution must introduce some evidence independent of the confession to establish that the crime described in the confession actually occurred.²

The corpus delicti rule was first developed more than three hundred years ago in England to prevent the conviction of those who confessed to non-existent crimes as a result of coercion or mental illness.³ By the end of the nineteenth century, the corpus delicti rule had been adopted in some form by almost all American jurisdictions.⁴

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¹ Literally, the "body of the crime." BLACK'S LAW DICTIONARY 346 (7th ed. 1999).

² This common formulation of the corpus delicti rule encompasses two elements: (1) that a specific injury or loss occurred; and (2) that someone's criminality (as opposed to, for example, an accident or a natural phenomenon) caused the injury or loss. See 7 JOHN H. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 2072, at 524 (James H. Chadmore ed., 1978).

³ See 2 MATTHEW HALE, PLEAS OF THE CROWN 290 (1678) ("I would never convict any person of murder or manslaughter, unless the fact were proven to be done, or at least the body found dead."). The English genesis of the corpus delicti rule is discussed more fully in Part II of this article.

⁴ See 7 WIGMORE, *supra* note 2, § 2071, at 511-16 (collecting cases).

The corpus delicti rule has fallen into disfavor in recent decades. In the last fifty years, the federal courts and at least ten states have abolished the rule and replaced it with a weaker "corroboration" rule that requires the prosecution to merely bolster the confession by some independent evidence, even if that independent evidence does not establish that any crime has occurred.⁵ Many scholars have applauded and encouraged this judicial trend toward abolition of the rule.⁶

The judicial and scholarly attacks on the corpus delicti rule typically fall into several broad categories. Some critics claim the rule is overbroad; that is, since an extrajudicial confession unsupported by independent evidence must be suppressed regardless of the defendant's mental state or the circumstances under which she made the confession, the critics argue that the rule must inevitably result in the suppression of reliable confessions.⁷ On the other hand, some critics attack the rule as inadequate to achieve its core purposes because it provides no protection to even the most patently mentally ill or coerced defendant who confesses, however implausibly, to an actual crime.⁸

By far the most common criticism of the rule, however, is that modern constitutional confession doctrines have rendered the rule obsolete. In particular,

⁵ See *Opper v. United States*, 348 U.S. 84, 93 (1954) (adopting corroboration rule for federal courts). For a list of state cases rejecting the corpus delicti rule, see *infra* note 102.

⁶ See, e.g., 7 WIGMORE, *supra* note 2, § 2070, at 510 ("The policy of any rule of the sort is questionable."); 1 MCCORMICK ON EVIDENCE § 145, at 563–64 (4th ed. 1992) (criticizing rule as ineffective and duplicative of other confession doctrines); Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 418 (1993) (concluding that "[a]ll forms of the corpus delicti rule should be abolished, including the corroboration requirement"); Maria Lisa Crisera, Comment, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8*, 78 CAL. L. REV. 1571, 1596–97 (1990) (arguing that California should replace the corpus delicti rule with a corroboration requirement); Catherine L. Goldenberg, Comment, *Sudden Infant Death Syndrome as a Mask for Murder: Investigating and Prosecuting Infanticide*, 28 SW. U. L. REV. 599, 612–22 (1999) (arguing that corpus delicti rule hinders prosecutions of infanticide).

⁷ See, e.g., 7 WIGMORE, *supra* note 2, § 2070, at 510 (arguing that false confessions of guilt are "exceedingly rare" and that, therefore, the corpus delicti rule is often "a positive obstruction to the course of justice"); Mullen, *supra* note 6, at 415 ("Literal compliance with the corpus delicti rule sometimes results in unsuccessful prosecutions of admittedly guilty people."); Crisera, *supra* note 6, at 1582–83 ("As long as [the corpus delicti rule] exists, it can be abused to keep perfectly reliable extrajudicial confessions out of evidence."); Goldenberg, *supra* note 6, at 618–19 (complaining that independent proof of infanticide is nearly impossible to obtain).

⁸ See, e.g., Mullen, *supra* note 6, at 405 (complaining that the rule "does not block the admission of dubious confessions if the prosecution meets a low threshold of evidence supporting the occurrence of the crime"); *People v. McMahan*, 548 N.W.2d 199, 205 (Mich. 1996) (Boyle, J. dissenting) ("[T]he common-law corpus delicti rule provides no protection to a person of limited intelligence or an unstable person pleading guilty to a crime someone else has committed.").

these critics argue that the due process⁹ voluntariness doctrine and the Fifth Amendment protections of *Miranda v. Arizona*¹⁰ have largely eliminated coerced and unreliable confessions.¹¹

In this article, I will defend the corpus delicti rule against these criticisms. Specifically, I will argue that the rule well serves the desirable purpose of precluding conviction in the rare case where the defendant's confession is so unreliable that there is little or no evidence other than the confession that a crime has occurred at all. Since centuries of experience, as well as recent DNA exonerations, have confirmed that juries all too frequently convict the innocent based entirely on uncorroborated and unreliable confessions, the corpus delicti rule is beneficial even though it is limited to those unusual cases. The rule's cost is the possible exclusion of a true confession, but I shall argue that a confession that cannot be corroborated even to the extent of establishing that a crime has occurred is always insufficiently reliable to justify a conviction.

I shall also argue in some detail that the corpus delicti rule remains necessary today despite the existence of modern constitutional confession doctrines. It is true that the *Miranda* doctrine limits the coercion inherent in custodial police interrogation, but *Miranda* does nothing to protect the mentally unstable suspect who confesses in a non-custodial setting or after waiving her *Miranda* rights. The due process voluntariness doctrine also does not adequately protect against confessions to non-existent crimes because the Supreme Court has explicitly decoupled the voluntariness of a confession from its reliability. Thus, in *Colorado v. Connelly*,¹² the Court held that the admission of a patently unreliable confession from a deranged defendant does not violate due process so long as the confession was not obtained through governmental "overreaching."¹³

Therefore, neither *Miranda* nor the due process voluntariness doctrine prevents the government from basing a conviction entirely upon an unreliable confession extracted from a mentally ill, intoxicated, or weak-minded suspect so long as the police do not violate the *Miranda* rules and do not otherwise overreach. Since the corpus delicti rule does exclude such confessions when the government cannot independently prove the existence of the alleged crime, the rule retains its value as a guard against wrongful convictions.

⁹ U.S. CONST. amend. XIV, § 1.

¹⁰ 384 U.S. 436, 444 (1966).

¹¹ See, e.g., 1 MCCORMICK ON EVIDENCE, *supra* note 6, § 145, at 563 ("Given the development of other confession law doctrines, especially Fifth Amendment protections as promulgated in *Miranda* and the voluntariness requirement, concerns regarding law enforcement interrogation practices do not provide significant support for the corroboration requirement."); Mullen, *supra* note 6, at 404 ("If the need to avoid involuntary confessions ever had any force as a rationale for the corpus delicti rule, that force has been dissipated by United States Supreme Court decisions limiting the admissibility of questionable confessions.").

¹² 479 U.S. 157 (1986).

¹³ *Id.* at 164.

In Part I of this article, I will set the stage for my defense of the corpus delicti rule by describing a recent unpublished case, *People v. McAllister*,¹⁴ in which a mentally disturbed woman was condemned to spend the rest of her life in prison for “committing” an apparently fictitious murder. In particular, I will use the *McAllister* case throughout this article to show how the corpus delicti rule can prevent miscarriages of justice in cases to which other confession doctrines do not apply at all.

I will demonstrate in Part II that these are the same types of cases that prompted the historical development of the corpus delicti rule in seventeenth century England and its transplantation to the United States in the early nineteenth century. I will then discuss the recent judicial trend toward abolishing or weakening the rule.

In Part III, I will set forth the scholarly attacks of the corpus delicti rule that have supported the recent abolition trend, and I will answer those attacks and defend the rule. In so arguing, I will devote considerable space to showing that modern constitutional confession doctrines cannot replace the corpus delicti rule in protecting the most vulnerable suspects from being convicted entirely on the basis of delusional confessions. I will also show why the weaker “corroboration” rule that applies in the federal courts and several states is an inadequate substitute for the corpus delicti rule.

II. A MODERN CORPUS DELICTI CASE: *PEOPLE V. MCALLISTER*

To understand why the corpus delicti rule remains necessary more than three hundred years after it was first developed, consider the very strange case of Dawn Marie McAllister.¹⁵

A. *The Death of an Infant and a Mother's Descent into Madness*

In 1989, Dawn McAllister lived with her boyfriend, Michael Blackburn, and her two boys, two-year-old Dustin and four-month-old Daniel, in her parents' home in a small town in central Michigan. On the evening of May 20, 1989, McAllister's mother, Alice, put the two boys to bed between 7:00 p.m. and 8:00 p.m.¹⁶ At 3:00 a.m., Alice checked on her grandsons on her way to bed, and she saw Daniel move his hands.¹⁷ At 4:25 a.m., McAllister, who had fallen asleep in front of the television with Blackburn, was awakened by her father, Stanley, who

¹⁴ No. 155392, slip op. (Mich. Ct. App. July 27, 1994).

¹⁵ As a former staff attorney at the Michigan State Appellate Defender Office, I represented Ms. McAllister on the direct appeal of her murder conviction in the Michigan Court of Appeals and the Michigan Supreme Court. The complete trial and appellate records of the *McAllister* case are available upon request from my files.

¹⁶ *McAllister*, No. 155392, slip op. at 1.

¹⁷ *Id.*

had arrived home from work.¹⁸ McAllister looked in on her boys for less than a minute and then went to bed.¹⁹

At 9:00 a.m., Blackburn, who had remained asleep in front of the television was awakened by Dustin's crying.²⁰ Blackburn entered McAllister's bedroom, woke her up, and told her to check on her children.²¹ McAllister then went into her boys' bedroom, picked up Daniel, and screamed that he was not breathing.²² Blackburn and Stanley McAllister attempted cardiopulmonary resuscitation and called for an ambulance.²³

Daniel McAllister was pronounced dead on arrival at the hospital at 9:44 a.m.²⁴ The attending physician estimated that Daniel had been dead for approximately six hours.²⁵

A pathologist and the local medical examiner performed an autopsy, and each concluded that Daniel had died from Sudden Infant Death Syndrome (SIDS).²⁶ Both physicians agreed that they found no evidence of criminality or any kind of trauma to Daniel, and both agreed that Daniel's death appeared to be a typical case of SIDS, the leading killer of infants between one week and one year of age.²⁷ One of the physicians discovered during that autopsy that Daniel was congested from a respiratory infection and concluded that the infection may have precipitated Daniel's death.²⁸ Having found "absolutely" no evidence of foul play, the medical examiner issued a death certificate listing SIDS as the cause of death.²⁹

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Trial Transcript, Vol. 2, at 42–44, *People v. McAllister*, No. 92-6589-FC (Shiawassee, Mich. Cir. Ct. 1992) (testimony of Michael Blackburn).

²¹ *Id.* at 46.

²² *Id.*

²³ *Id.*

²⁴ *McAllister*, No. 155392, slip op. at 1.

²⁵ *Id.*

²⁶ *Id.* at 1–3.

²⁷ *Id.* at 2. One of the doctors explained that Daniel was especially at risk as SIDS most frequently occurs between two and four months of age and is more common in male infants. *Id.*

²⁸ *Id.* at 3–4. The other physician believed it was unlikely the infection had contributed to the death. *Id.* at 3. Three witnesses testified at the trial that McAllister had taken Daniel to a clinic three days before his death because he was very congested and having difficulty breathing. Trial Transcript, Vol. 2, at 71, 81–83, 92, *McAllister*, No. 92-6589-FC (testimony of Alice McAllister); *id.* Vol. 3, at 46–50 (testimony of Sharee Buning); *id.* at 53–54 (testimony of Mary McPherson). A public health nurse testified that she visited Daniel eight times in the three months before his death and had become very concerned about Daniel's breathing problems. *Id.* at 181–88 (testimony of Florence Manning).

²⁹ Trial Transcript, Vol. 2, at 104–77, *McAllister*, No. 92-6589-FC (testimony of Dr. Fred Van Alstine).

Dawn McAllister, who already had a long history of mental illness, took a dramatic turn for the worse after Daniel's death. In December 1990, McAllister was hospitalized at a psychiatric institution for the seventh time after she reported hallucinations involving bugs and snakes.³⁰ The treating psychiatrist concluded that McAllister suffered from multiple personality disorder, atypical psychosis, and a panic disorder.³¹

During this hospitalization, McAllister also told her psychiatrist that she had been a member of a Satanic cult years earlier in which she and other cult members had sacrificed babies.³² The psychiatrist then contacted the Michigan State Police and arranged for an officer to interview her.³³

During that interview with the state police, McAllister told the officer that she had given birth to a boy named "Nicholas" in 1982 or 1983, that she was a member of a Satanic cult that had sacrificed several babies, including "Nicholas," and that she and other cult members ate the babies' flesh and drank their blood.³⁴ The officer never believed these bizarre stories, and his investigation confirmed that McAllister never had a child in the early 1980s and that the places she described did not exist.³⁵

McAllister's baby-sacrificing Satanic cult story was not atypical, given her psychiatric history. A year before Daniel's death, she filed a "totally false" complaint with the local police,³⁶ she claimed after Daniel's death that her mother had killed Daniel in a Satanic ritual,³⁷ and she told a minister that she was hearing voices that were telling her that she had killed Daniel.³⁸ Two of the mental health professionals who examined McAllister confirmed that her condition caused her to fabricate stories that were out of touch with reality.³⁹

³⁰ Trial Transcript, Vol. 3, at 63, *McAllister*, No. 92-6589-FC (testimony of Dr. Donald Jacobson).

³¹ *Id.* at 61-63, 89-90, 98-99. A psychologist who treated McAllister for two years after Daniel's death rejected the multiple personality disorder diagnosis and instead concluded that McAllister suffered from borderline personality disorder. *Id.* at 108-12 (testimony of Dr. Judith Hovey). A psychiatrist who examined McAllister after she was arrested in November 1991 agreed that McAllister had borderline personality disorder. *Id.* at 120-26 (testimony of Dr. Carol Holden).

³² *Id.* at 69-72 (testimony of Dr. Donald Jacobson).

³³ *Id.* at 73.

³⁴ Trial Transcript, Vol. 2, at 30-32, 37-38, *McAllister*, No. 92-6589-FC (testimony of Officer Gary Peterson).

³⁵ *Id.* at 33-34, 39.

³⁶ Trial Transcript, Vol. 3, at 8, *McAllister*, No. 92-6589-FC (offer of proof of testimony of Detective Victor Wasylyshyn).

³⁷ *Id.* at 29 (testimony of Robert Hoschner).

³⁸ *Id.* at 34, 37 (testimony of Reverend Paul Castle).

³⁹ *See id.* at 110 (testimony of Dr. Judith Hovey) (stating that McAllister told stories that were "distortions of reality"); *id.* at 126 (testimony of Dr. Carol Holden) (testifying that

It is this quality that made Dawn McAllister such an easy defendant to convict.

B. How To Win a Murder Case with Nothing but a Confession

After discrediting McAllister's Satanic sacrifice story, the Michigan State Police arranged for McAllister to be interrogated by Sergeant John Palmatier, a police detective with doctorate-level training in psychology.⁴⁰ Palmatier later explained that he had been interested in the case since Daniel's death two years earlier because he believes that many, if not most, SIDS cases are actually maternal homicides.⁴¹

Having an experienced and aggressive interrogator like Sergeant Palmatier question a woman like McAllister was certainly overkill. At the time of McAllister's interrogation, Palmatier was best known in Michigan for an eight-hour-long videotaped interrogation of a murder suspect during which Palmatier used hypnotic techniques to place the suspect in a trancelike state.⁴²

Getting McAllister to submit to an interrogation was easy. In September 1991, after McAllister had repeated her claim that her mother had killed Daniel two years earlier, a police detective urged McAllister and her mother to take polygraph examinations.⁴³ After McAllister arrived at State Police headquarters for her "polygraph examination," she was ushered into an interrogation room with Sergeant Palmatier. Palmatier did not videotape his interrogation of McAllister even though he set up a video camera so another detective could watch the interrogation from another room.⁴⁴

It took one hour and forty-five minutes for Palmatier to extract a confession from McAllister.⁴⁵ Palmatier told McAllister that "he felt that she had something to do with the death of the baby, Daniel,"⁴⁶ and suggested that she had killed

McAllister "seemed to tell people either what she thought they wanted to hear or what she thought would get her the most attention").

⁴⁰ Suppression Hearing, Transcript at 63, 72, *People v. McAllister*, No. 92-6589FC (Shiawassee, Mich. Cir. Ct. June 5, 1992) (testimony of John Palmatier).

⁴¹ *Id.* at 74-77.

⁴² See generally *People v. DeLisle*, 455 N.W.2d 401, 402 (Mich. Ct. App. 1990) (upholding trial court's finding that confession was involuntary product of Palmatier's psychological techniques).

⁴³ *People v. McAllister*, No. 155392, slip op. at 1 (Mich. Ct. App. July 27, 1994).

⁴⁴ Suppression Hearing, Transcript, at 14-15, *McAllister*, No. 92-6589-FC (testimony of Gail Van Lopik). Palmatier's decision not to videotape the interrogation is not surprising since the videotape in the *DeLisle* case had been used to prove that his tactics amounted to psychological coercion. See *DeLisle*, *supra* note 42.

⁴⁵ Suppression Hearing, Transcript, at 16, *McAllister*, No. 92-6589-FC.

⁴⁶ *Id.*

Daniel to stop him from crying.⁴⁷ McAllister finally responded by nodding her head.⁴⁸ The other detective then entered the room, read McAllister the *Miranda* warnings, and asked her to provide a written statement.⁴⁹ After McAllister produced a written statement, in which she claimed that she had smothered Daniel with a blanket to stop him from crying, she was allowed to leave.⁵⁰

McAllister was arrested three days later and charged with murder. After she was placed in a jail cell with several other women, she initially told her cellmates that she had smothered her baby, but then steadfastly denied it.⁵¹

Before trial, McAllister unsuccessfully moved to suppress her inculpatory statements on both corpus delicti and involuntariness grounds.⁵² At her trial, therefore, the prosecution introduced McAllister's police statement and the statement to her cellmates as the only evidence that Daniel McAllister had died from anything other than natural causes.

The pathologist and the medical examiner who had performed the autopsy not only testified during the trial that Daniel had, in their opinion, died of SIDS but also that all physical signs of intentional suffocation that one would expect to find were completely absent from the autopsy.⁵³ While McAllister's statement recited that she had killed Daniel to stop his crying, none of the adults in the house on the night of Daniel's death heard any crying.⁵⁴ No physical evidence of any kind was introduced to substantiate the prosecution's claim that Daniel had

⁴⁷ Trial Transcript, Vol. 2, at 161, *People v. McAllister*, No. 92-6589-FC (Shiawassee, Mich. Cir. Ct. 1992) (testimony of John Palmatier).

⁴⁸ *Id.* at 161.

⁴⁹ Suppression Hearing, Transcript, at 18-21, *McAllister*, No. 92-6589-FC (testimony of Gail Van Lopik).

⁵⁰ *Id.* at 22-23; Trial Transcript, Vol. 2, at 183-88, *McAllister*, No. 92-6589-FC (testimony of Gail Van Lopik).

⁵¹ Trial Transcript, Vol. 2, at 148, 153-54, *McAllister*, No. 92-6589-FC (testimony of Kimberly Garries); *id.* at 202-03 (testimony of Jo Ann Gray). A third cellmate claimed that McAllister had admitted killing Daniel while "getting high" with "a couple of friends." *Id.* at 214, 218 (testimony of Angela Perkins).

⁵² The trial judge rejected the corpus delicti claim in a written order in which he concluded that "there was sufficient independent evidence to establish that a death resulted because of a criminal agency." *People v. McAllister*, No. 92-6589-FC (Shiawassee, Mich. Cir. Ct. June 1, 1992) (order denying motion to suppress confession). The order does not identify any such independent evidence. The trial judge orally rejected the voluntariness claim after crediting the officers' testimony that McAllister had behaved appropriately during the interrogation. Suppression Hearing, Transcript, at 89, *McAllister*, No. 92-6589-FC.

⁵³ See *People v. McAllister*, No. 155392, slip op. at 2-3 (Mich. Ct. App. July 27, 1994) (describing trial testimony of Dr. Christopher Wiseman and Dr. Fred Van Alstine).

⁵⁴ For example, Michael Blackburn testified that he would have heard Daniel crying from the place he was sleeping, but he did not hear any crying until Daniel's brother, Dustin, woke him up the next morning. Trial Transcript, Vol. 2, at 56, *McAllister*, No. 92-6589-FC (testimony of Michael Blackburn).

been murdered, but numerous witnesses testified that Daniel was a sickly infant with a history of respiratory problems.⁵⁵

In short, the only evidence that Daniel had been murdered was the police statement McAllister signed at police headquarters and the initial statement that she made to her cellmates. But that was enough. The jury convicted McAllister of second-degree murder, and she was sentenced to spend the rest of her life in prison.

C. Undoing an Injustice with the Corpus Delicti Rule

Two years later, the Michigan Court of Appeals overturned McAllister's conviction because the admission of her inculpatory statements violated the corpus delicti rule.⁵⁶ Since the prosecution could not establish the corpus delicti of homicide independent of McAllister's statements, the Court of Appeals ordered that a directed verdict of not guilty be entered.⁵⁷

McAllister was a straightforward corpus delicti case. In a homicide case, the appellate court observed, the corpus delicti rule requires the prosecution to establish, by a preponderance of the evidence independent of the defendant's statements, that "the victim is dead as a result of some criminal agency."⁵⁸ Since there was no evidence that Daniel died from foul play other than McAllister's statements, the prosecution could not establish the corpus delicti. The statements, therefore, should not have been admitted, and without the statements there was no case.

McAllister's statements were exactly the sort of unreliable evidence that the corpus delicti rule was designed to exclude. That is, her statements were highly unreliable under any reasonable criteria as they were extracted by an experienced police interrogator from a mentally disturbed person with an established history of fabrication, and they contradicted all other available evidence, including expert scientific testimony and the testimony of witnesses to the events described in the confession. The same facts that made McAllister's statements excludable under the corpus delicti rule also were the clearest indication that the statements were unreliable; that is, there was no independent proof that the crime described in the statements had occurred at all.

What is striking about Dawn McAllister's case, however, is that she almost certainly would still be in prison today if Michigan, like several other American jurisdictions, had followed the recent trend of abolishing the corpus delicti rule. Without the corpus delicti rule, the admission of her statement, and, therefore, her conviction, would almost certainly have been upheld.

⁵⁵ See *supra* note 28.

⁵⁶ *McAllister*, No. 155392, slip op. at 2-4.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 2 (citing *People v. Williams*, 373 N.W.2d 567 (Mich. 1985)).

As I will demonstrate in detail in Part III.C of this article, no constitutional doctrine would have required the suppression of McAllister's statements. Since McAllister was not in custody at the time of her interrogation, *Miranda* had no application to her case. In light of *Colorado v. Connelly*,⁵⁹ the appellate courts almost certainly would not have found that the admission of McAllister's statements violated due process. While it was undisputed that McAllister was severely mentally ill and vulnerable to suggestion, *Connelly* holds that such facts are irrelevant unless there is also evidence of "police overreaching" in the interrogation. Since McAllister "voluntarily" went to State Police headquarters, was not in custody, and was questioned for less than two hours, it is difficult to imagine that any appellate court could find her statement involuntary. After *Connelly*, the fact that the statement is patently unreliable and contradicts objective reality is simply irrelevant to the voluntariness inquiry.

As I will show in Part III.D of this article, the "corroboration" or "trustworthiness" standards that some jurisdictions have adopted in lieu of the corpus delicti rule would not have helped McAllister either. The prosecution probably would have been able to meet those standards simply by showing that she repeated her statements, that several officers overheard them, and that some facts in the statements were true.

Without the corpus delicti rule, Dawn McAllister's confession would have been fully admissible, and her conviction presumably would have been upheld. *McAllister* thus serves as a perfect example of the admittedly rare case for which the corpus delicti rule still serves its historical function of preventing the wrongful conviction of a mentally ill or otherwise weak-minded defendant who has confessed to a fictitious crime. Since, as I will show below, the critics have failed to demonstrate any significant costs associated with retaining the rule, the corpus delicti rule is well worth keeping.

III. THE VENERABLE ORIGINS OF A STRANGE DOCTRINE: A BRIEF HISTORY OF THE CORPUS DELICTI RULE

To see how a modern case such as *McAllister* presents exactly the sort of danger the corpus delicti rule was designed to prevent, it is important to understand why the rule was developed in the first place. For that, we must turn to seventeenth century England.

A. *The Early English Cases*

Most scholars agree that the impetus for the corpus delicti rule traces to several seventeenth century English cases in which defendants were executed for

⁵⁹ 479 U.S. 157 (1986).

murders of missing "victims" who later turned out to be very much alive.⁶⁰ Lord Hale cited two such cases in his 1678 treatise, *Pleas of the Crown*, in support of his pronouncement that: "I would never convict any person of murder or manslaughter, unless the fact were proven to be done, or at least the body found dead."⁶¹ In Hale's first case, a man was convicted for murdering his young niece, who had last been seen begging for her life as he was physically punishing her.⁶² The niece, as it turns out, had actually run away after the beating. Unfortunately, this fact became clear only when she returned home to claim her inheritance after her uncle had already been executed.⁶³

In Hale's second case, a man, "B," was convicted of murdering another man, "A," who had disappeared under suspicious circumstances. Less than a year after B's execution, A returned home with the explanation that B had forcibly sent him overseas.⁶⁴

Even though Hale is often cited as the principal source for the corpus delicti rule,⁶⁵ the rule, at least as it is applied today in American courts, would not have prevented the wrongful convictions in either of his two cases. As several modern commentators have noted, the corpus delicti rule would not apply to Hale's cases at all because neither the uncle nor B ever confessed.⁶⁶ Further, even if the uncle and B had confessed, those confessions might still have been admissible as there was apparently at least some independent evidence in each case that the person who disappeared had been murdered.⁶⁷

⁶⁰ See, e.g., Mullen, *supra* note 6, at 399; Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 173-75 (1962). At least one author has claimed that the corpus delicti rule traces back to the 13th century. Emanuel Margolis, *Corpus Delicti: State of the Disunion*, 2 SUFFOLK U. L. REV. 44, 46 (1968). However, the only authority cited for this earlier claim relates to the self-incrimination privilege, not the corpus delicti rule. See *id.* at 46 n.15.

⁶¹ See 2 HALE, *supra* note 3, at 290.

⁶² *Id.* at 290 note g.

⁶³ *Id.*

⁶⁴ *Id.* at 290. Hale ends his account of this unfortunate episode with the gratuitous observation that since B had involuntarily deported A, B "justly deserved death, yet he was really not guilty of that offense, for which he suffered." *Id.*

⁶⁵ See, e.g., Mullen, *supra* note 6, at 399 n.70.

⁶⁶ See Perkins, *supra* note 60, at 174; Mullen, *supra* note 6, at 399-400.

⁶⁷ In a murder case, the corpus delicti consists of proof that the alleged victim is actually dead and that his death was caused by a criminal agency. Perkins, *supra* note 60, at 181. Circumstantial evidence concerning the alleged victim's disappearance may satisfy the corpus delicti rule. For example, in *United States v. Williams*, 28 F. Cas. 636 (No. 16707) (C.C.D. Me. 1858), the court upheld the convictions of three seamen who had confessed to killing their crewmates on a ship, even though the ship and the crewmates were never found, by relying on circumstantial evidence that the seamen had carefully planned their evacuation from the ship. As for the uncle mentioned by Hale, the testimony that the niece was last seen begging for her life during a beating could constitute sufficient independent evidence that she had been

In other words, Hale did not actually propose the corpus delicti rule, and the corpus delicti rule would not have affected the cases he mentioned. What Hale did propose was a rule requiring the prosecution to produce the victim's body in a homicide case, a requirement that the common law has never accepted.⁶⁸

Ironically, another missing victim case that does actually support the corpus delicti rule, *Perrys' Case*,⁶⁹ came to light just a few years before *Pleas of the Crown* was published, but Hale was apparently unaware of it. One day in 1660, an elderly Gloucestershire man named William Harrison disappeared as he made his rounds to collect rents for his employer.⁷⁰ After some of Harrison's personal possessions were found on the highway, suspicion fell upon his servant, John Perry.⁷¹ Taken into custody and repeatedly interrogated by a justice of the peace, Perry initially denied any wrongdoing.⁷² As the interrogations continued, however, Perry eventually changed his story and claimed that he, his mother, and his brother had robbed and murdered Harrison and that they had dumped the body in a swamp.⁷³ Even though searchers failed to find Harrison's body in the swamp and even though Perry's mother and brother vigorously denied Perry's story, Perry, his mother, and his brother were convicted and executed entirely on the strength of Perry's confession.⁷⁴

Some years after the unfortunate Perrys had been executed, Harrison returned home to Gloucestershire. In a letter to a local knight, Harrison explained that he had been kidnapped, shipped to Turkey, and sold into slavery, and that he had eventually escaped and returned to England.⁷⁵

Perrys' Case, unlike the cases Hale cited, is a true corpus delicti case, a case in which an uncorroborated confession to a non-existent crime was admitted into evidence. Indeed, the report of *Perrys' Case* specifically recognized that Perry's false confession caused the miscarriage of justice: "Many question the truth of this account Mr. Harrison gives of himself, and his transportation, believing he

murdered. In B's case, Hale explained that "A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found." See 2 HALE, *supra* note 3, at 290. If the circumstances of A's disappearance (or B's oven) were sufficiently suspicious to amount to independent evidence that A had been murdered, the corpus delicti rule would not exclude a confession.

⁶⁸ See Perkins, *supra* note 60, at 182-83 (citation omitted). Justice Story once pointed out that such a rule "would amount to a universal condonation of all murders committed on the high seas." *Id.* (citing *United States v. Gilbert*, 25 F. Cas. 1287, 1290 (No. 15204) (C.C.D. Mass. 1834)).

⁶⁹ 14 HOWELL ST. TR. 1312 (1661).

⁷⁰ *Id.* at 1313.

⁷¹ *Id.* at 1314.

⁷² *Id.* at 1314-15.

⁷³ *Id.* at 1315-16.

⁷⁴ *Id.* at 1317-19.

⁷⁵ *Perrys' Case*, 14 HOWELL ST. TR. at 1319-22.

was never out of England; but there is no question of Perry's telling a formal false story to hang himself, his mother and his brother."⁷⁶ Thus, some commentators have suggested that the corpus delicti rule was developed, at least in part, in reaction to *Perrys' Case*.⁷⁷

Even though the corpus delicti rule derives from English cases, it never actually became a part of the English common law.⁷⁸ As Professor Wigmore has demonstrated, English courts issued confusing and contradictory rulings on the subject throughout the eighteenth and nineteenth centuries, and the rule applies today in England, if at all, only in homicide cases.⁷⁹

B. *The Nineteenth Century Rise of the Corpus Delicti Rule in the United States*

Nineteenth-century American courts turned out to be much more receptive than their English counterparts to the corpus delicti rule. Although the reasons for the disparity are not completely clear, it appears that a widely-publicized American version of *Perrys' Case* has much to do with the rule's success on this side of the Atlantic.⁸⁰

In May 1812, Russel Colvin suddenly disappeared from his home in Manchester, Vermont. As years went by with no sign of Colvin, the townspeople began to suspect foul play, particularly since Jesse and Stephen Boorn, Colvin's brothers-in-law, were known to have disliked Colvin and had spoken "strangely" of his disappearance.⁸¹ Finally in 1819, after some bones, initially thought to be human, were found near the Boorn home, Jesse was arrested.⁸²

While in custody, Jesse claimed that his brother, Stephen, had killed Colvin.⁸³ Stephen, who by this time had moved to New York, was then arrested

⁷⁶ *Id.* at 1323.

⁷⁷ See, e.g., J. Terry Schwarz, Comment, *California's Corpus Delicti Rule: The Case for Review and Clarification*, 20 UCLA L. REV. 1055, 1060-61 (1973); see also Perkins, *supra* note 60, at 174-75.

⁷⁸ As the Supreme Court put it in *Opper v. United States*, 348 U.S. 84 (1954), "[English] courts have been hesitant to lay down a rule that an uncorroborated extrajudicial confession may not send an accused to prison or to death." *Id.* at 89 (footnote omitted).

⁷⁹ 7 WIGMORE, *supra* note 2, § 2070, at 508-10; see also *Opper*, 348 U.S. at 89 n.5 (noting that "[i]n some cases a person may be convicted [in England] on his own [uncorroborated] confession," but that proof of the corpus delicti may be required for manslaughter).

⁸⁰ See *The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. 73 (1819).

⁸¹ *Id.* at 73-74.

⁸² *Id.* at 74-75. After Jesse's arrest, four physicians examined the bones and unanimously concluded that they were not human. *Id.* at 75.

⁸³ *Id.* at 75.

and brought back to Vermont.⁸⁴ Although Stephen initially denied killing Colvin, he eventually confessed after he was told that the evidence against him was overwhelming and that a confession was his only hope to avoid the death penalty.⁸⁵

During the Boorns' trial before the Vermont Supreme Court, the prosecution introduced no evidence that Colvin had been murdered except for the brothers' confessions, while the defense claimed that the confessions were the product of undue pressure.⁸⁶ The jury quickly convicted the Boorns, and the Chief Justice condemned both brothers to hang.⁸⁷ The Vermont Legislature commuted Jesse's sentence to life imprisonment but confirmed Stephen's death sentence.⁸⁸

In a last ditch attempt to save Stephen Boorn's life, his attorney placed a notice in a local newspaper for information as to Colvin's whereabouts.⁸⁹ The *New York Evening Post* reprinted the notice a few days later, and, after overhearing several men discussing the notice in a New York hotel, one Tabor Chadwick became convinced that a deranged man he had met in New Jersey was Colvin.⁹⁰ After Chadwick reported his suspicions to the authorities and to the *New York Evening Post*, the man in question, who continued to deny he was Colvin, was taken back to Vermont, where he was instantly recognized as the long-missing Russel Colvin.⁹¹ The justices of the Vermont Supreme Court initially refused to believe that Colvin was alive but, just days before Stephen's scheduled execution, the court relented and granted the Boorns a new trial.⁹² Thanks to the persistence of Stephen Boorn's lawyer and a great deal of luck, the United States had, by the narrowest of margins, avoided a repeat of the awful outcome in *Perrys' Case*.

The Boorns' case was heavily publicized⁹³ and apparently influenced, at least indirectly, the widespread adoption of the corpus delicti rule in the United States. Some two decades after Stephen Boorn's close encounter with the gallows, Professor Greenleaf recounted the Boorns' case in his classic and influential

⁸⁴ *Id.* at 75–76. In addition, another jail inmate claimed that Jesse had confessed to him. *Id.* at 76.

⁸⁵ *Id.* at 76, 91.

⁸⁶ *The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. at 76–77.

⁸⁷ *Id.* at 77.

⁸⁸ *Id.*

⁸⁹ *Id.* at 92.

⁹⁰ *Id.*

⁹¹ *Id.* at 92–94.

⁹² *The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. at 94–95. The prosecution immediately abandoned the case, and the Boorns were set free. *Id.* at 95.

⁹³ After the *New York Evening Post* published Chadwick's letter, New York Mayor DeWitt Clinton even arranged for the city treasury to pay the expenses of a New Yorker who had volunteered to travel to New Jersey to investigate whether the man was indeed Russel Colvin. *Id.* at 93.

evidence treatise in support of the proposition that “evidence of verbal confessions of guilt is to be *received with great caution*.”⁹⁴ Since the corpus delicti rule is consistent with this view, Professor Greenleaf wholeheartedly endorsed it:

In the United States, the prisoner’s confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases.⁹⁵

Since, as Professor Wigmore has observed, most American jurisdictions adopted the corpus delicti rule during the nineteenth century, “chiefly moved, in all probability, by Professor Greenleaf’s suggestion,”⁹⁶ it appears that the Boorns’ case had a significant impact on the adoption of the rule in the United States. That impact turned out to be durable; all American jurisdictions apparently still require extrajudicial confessions to be corroborated to at least some extent,⁹⁷ and most jurisdictions still require that the prosecution independently establish the corpus delicti.⁹⁸ As discussed in the next subsection, it is only in recent decades that this judicial acceptance of the corpus delicti rule has begun to decline.

C. The Recent Erosion of the Rule in the United States

Nearly a half century ago, the United States Supreme Court struck the first big blow against the corpus delicti rule in *Opper v. United States*.⁹⁹ In *Opper*, the Court held that independent evidence corroborating a confession need not establish the corpus delicti at all, but merely must “tend to establish the trustworthiness of the statement.”¹⁰⁰ In a companion case, *Smith v. United*

⁹⁴ SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 214, at 297–98 & n.1 (10th ed. 1860).

⁹⁵ *Id.* § 217, at 301–02.

⁹⁶ 7 WIGMORE, *supra* note 2, § 2071, at 511 (citation omitted).

⁹⁷ 1 MCCORMICK ON EVIDENCE, *supra* note 6, § 145, at 555.

⁹⁸ See 7 WIGMORE, *supra* note 2, § 2071, at 516–23 & n. 4 (listing cases from thirty-seven American states plus the District of Columbia and Puerto Rico); see also *infra* note 105.

⁹⁹ 348 U.S. 84 (1954).

¹⁰⁰ *Id.* at 93. *Opper* is an exceedingly strange vehicle for the Court’s holding since the government unquestionably *did* establish the corpus delicti independent of *Opper*’s admissions. *Opper* was convicted of paying a federal employee compensation for rendering a governmental service, a crime requiring the government to prove two elements: (1) *Opper* paid a federal employee; and (2) the payment was for a governmental service. *Id.* at 85, 94. In his admission, *Opper* conceded that he had paid money to a federal employee but denied that the payments were for governmental services. *Id.* at 88. However, the government proved through substantial independent evidence both elements of the crime: that *Opper* had indeed paid the federal

States,¹⁰¹ the Court further explained that, “[a]ll elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense through the statements of the accused.”¹⁰²

In the last forty years, courts in at least ten states and the District of Columbia have followed the Supreme Court’s lead in *Opper* by rejecting or abolishing the corpus delicti rule in favor of a “corroboration” or “trustworthiness” standard.¹⁰³ Only two years after Dawn McAllister won her case on corpus delicti grounds in Michigan, the Michigan Supreme Court came within one vote of abolishing the

employee and that the employee had rendered governmental services to *Opper*. *Id.* at 93–94 & nn.12–13. Since, as the Court put it, the “independent evidence of services and of facts within the admissions seems adequate to constitute corroboration of petitioner’s extrajudicial admissions *and also establish the corpus delicti*,” the Court had no need to reject the corpus delicti rule in order to uphold *Opper*’s conviction. *Id.* at 94 (emphasis added).

¹⁰¹ 348 U.S. 147 (1954).

¹⁰² *Id.* at 156 (internal quotation marks omitted) (citation omitted).

¹⁰³ See generally *Armstrong v. State*, 502 P.2d 440, 447 (Alaska 1972) (adopting *Opper* standard in Alaska); *State v. Hafford*, 746 A.2d 150, 172–74 (Conn. 2000) (adopting *Opper* standard for all types of crimes in Connecticut); *Harrison v. United States*, 281 A.2d 222, 224–25 (D.C. 1971) (following *Opper* standard in the District of Columbia); *Gilder v. State*, 133 S.E.2d 861, 862–63 (Ga. 1963) (holding that “corroboration of a confession in any material particular” suffices in Georgia); *State v. Yoshida*, 354 P.2d 986, 990 (Haw. 1960) (adopting trustworthiness standard in Hawaii); *State v. Urie*, 437 P.2d 24, 26–27 (Idaho 1968) (citations omitted) (holding “slight corroboration will suffice” to admit confession and corroboration need not establish elements of corpus delicti in Idaho); *State v. Hansen*, 989 P.2d 338, 346 (Mont. 1999) (citing *Opper* approvingly and concluding that “the corpus delicti rule outlived its usefulness,” but noting that the Montana statute, MONT. CODE ANN. § 45-5-111, requires continued use of rule in homicide cases only); *State v. George*, 257 A.2d 19, 20–21 (N.H. 1969) (holding substantial evidence independent of confession suffices in New Hampshire); *State v. Parker*, 337 S.E.2d 487, 495–97 (N.C. 1985) (confession admissible if “trustworth[y]” even if corpus delicti not established by independent evidence in North Carolina); *Fontenot v. State*, 881 P.2d 69, 77–78 (Okla. Crim. App. 1994) (abolishing corpus delicti rule in favor of *Opper* standard in Oklahoma); *Holt v. State*, 117 N.W.2d 626, 633 (Wis. 1962) (holding prosecution need only corroborate “any significant fact” in Wisconsin). An eleventh state, North Dakota, formerly had a statutory corpus delicti rule that applied only in homicide cases, but that provision was repealed in 1973. See *State v. Champagne*, 198 N.W.2d 218, 227–28 (N.D. 1972) (citing N.D. CENT. CODE § 12-27-28 (1972)). Therefore, it appears that North Dakota currently has no corpus delicti rule.

rule.¹⁰⁴ During this period, only one state, Massachusetts, has bucked the trend by adopting the corpus delicti rule.¹⁰⁵

It is true that the corpus delicti rule lives on, at least formally, in some thirty-nine states.¹⁰⁶ However, as Thomas Mullen has documented, some courts in

¹⁰⁴ See *People v. McMahan*, 548 N.W.2d 199, 201–02 (Mich. 1996) (declining to abolish corpus delicti rule by a four to three vote). The Washington Supreme Court recently declined to abolish its corpus delicti rule by an eight to one vote. See *State v. Ray*, 926 P.2d 904, 906 (Wash. 1996).

¹⁰⁵ See *Commonwealth v. Forde*, 466 N.E.2d 510, 513–14 (Mass. 1984) (overruling prior caselaw and adopting the corpus delicti rule).

¹⁰⁶ For examples of recent published state decisions citing and applying local versions of the corpus delicti rule, see: *Slaton v. State*, 680 So. 2d 879, 897 (Ala. Crim. App. 1995) (stating corpus delicti rule and finding corpus delicti of murder and rape by condition of victim's body in Alabama); *State v. Jones ex rel. County of Maricopa*, 6 P.3d 323, 326–29 (Ariz. Ct. App. 2000) (setting forth corpus delicti rule but holding rule does not apply at preliminary examination in Arizona); *Barnes v. State*, 55 S.W.3d 271, 276 (Ark. 2001) (observing that the corpus delicti rule “mandates only proof that the offense occurred and nothing more” in Arkansas); *People v. Kraft*, 5 P.3d 68, 116 (Cal. 2000) (stating rule and holding corpus delicti of murder satisfied by circumstances in which body was discovered in California); *People ex rel. T.A.O.*, 36 P.3d 180, 181–82 (Colo. Ct. App. 2001) (applying corpus delicti rule to reverse juvenile's sexual assault conviction in Colorado); *Shipley v. State*, 570 A.2d 1159, 1168–70 (Del. 1990) (stating rule and holding corpus delicti satisfied by condition of body and circumstances of victim's disappearance in Delaware); *Schwab v. State*, 636 So. 2d 3, 6 (Fla. 1994) (stating rule and finding corpus delicti of murder, kidnapping, and rape satisfied by medical examiner's testimony and other evidence in Florida); *People v. Williams*, 742 N.E.2d 774, 781–82 (Ill. App. Ct. 2000) (stating rule and finding corpus delicti of murder satisfied by independent evidence in Illinois); *Workman v. State*, 716 N.E.2d 445, 447–48 (Ind. 1999) (stating rule, but finding corpus delicti satisfied so long as independent proof of one crime committed during criminal episode is supplied in Illinois); *State v. Schomaker*, 303 N.W.2d 129, 130–32 (Iowa 1981) (discussing Iowa's version of corpus delicti rule, codified at IOWA R. CRIM. P. § 2.21(4) (West 2002), requiring independent evidence that crime occurred and defendant committed it); *State v. Dang*, 978 P.2d 277, 284–85 (Kan. 1999) (stating rule and finding corpus delicti of murder established by condition of bodies in Kansas); *Lofthouse v. Commonwealth*, 13 S.W.3d 236, 242 (Ky. 2000) (applying codified corpus delicti rule, KY. R. CRIM. P. § 9.60 (Banks-Baldwin 2002), and finding corpus delicti of drug trafficking satisfied by independent evidence in Kentucky); *State v. Martin*, 645 So. 2d 190, 195 (La. 1994) (holding that, under Louisiana version of corpus delicti rule, corroborative evidence independent of confession “need only show the essential injury involved in the charged crime . . . [but] need not show every element in the definition of the charged crime”); *State v. Deschenes*, 780 A.2d 295, 298–99 (Me. 2001) (stating corpus delicti rule but applying statutory exception to rule for drunk driving cases to uphold operating under the influence conviction based entirely on defendant's admission that he was driving the vehicle in Maine); *Paz v. State*, 726 A.2d 880, 883–84 (Md. 1999) (stating rule and finding corpus delicti of attempted rape satisfied by police observations of defendant's attack on victim in Maryland); *Commonwealth v. Sineiro*, 740 N.E.2d 602, 610 n.11 (Mass. 2000) (stating rule in dicta for Massachusetts); *People v. McMahan*, 548 N.W.2d 199, 201–03 (Mich. 1996) (reaffirming corpus delicti rule and finding insufficient independent evidence that deceased died from criminal agency in Michigan); *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995) (citing Minnesota's statutory

corpus delicti rule, MINN. STAT. § 634.03 (1994), and finding corpus delicti of burglary satisfied by circumstances of offense); *Edwards v. State*, 737 So. 2d 275, 311–12 (Miss. 1999) (citing corpus delicti rule for Mississippi and holding that prosecution may introduce confession before introducing independent evidence); *State v. Crenshaw*, 59 S.W.3d 45, 49 (Mo. Ct. App. 2001) (applying rule in Missouri and finding insufficient independent evidence of rape and sodomy); *State v. Torwirt*, 607 N.W.2d 541, 546–47 (Neb. Ct. App. 2000) (stating rule for Nebraska and finding insufficient independent evidence that sexual assault occurred); *Sheriff of Washoe County v. Dhadda*, 980 P.2d 1062, 1065–67 (Nev. 1999) (stating rule but holding that admissions made before crime committed may be used to establish corpus delicti of kidnapping in Nevada); *State v. Di Frisco*, 571 A.2d 914, 923 (N.J. 1990) (observing that New Jersey corpus delicti rule requires independent proof both of existence of crime and of trustworthiness of confession); *State v. Sosa*, 14 P.3d 32, 36–37 (N.M. 2000) (stating rule and finding corpus delicti of murder satisfied by condition of victim's body in New Mexico); *People v. Lewandowski*, 682 N.Y.S.2d 326, 327 (N.Y. App. Div. 1998) (stating rule for New York and finding corpus delicti of forgery satisfied by signed receipts and testimony of victim that signatures were not his); *State v. Haynes*, 719 N.E.2d 576, 578–80 (Ohio Ct. App. 1998) (stating rule for Ohio and finding insufficient independent evidence supporting evidence tampering charge); *State v. Fry*, 42 P.3d 369, 370–73 (Or. Ct. App. 2002) (applying Oregon's statutory corpus delicti rule, OR. REV. STAT. § 136.425(1) (2001), and finding insufficient independent evidence for three of four rape counts); *Commonwealth v. McMullen*, 681 A.2d 717, 720–23 (Pa. 1996) (stating rule for Pennsylvania and finding independent evidence insufficient to establish corpus delicti of homicide); *State v. Marini*, 638 A.2d 507, 515 n.3 (R.I. 1994) (stating rule and finding corpus delicti of arson satisfied by independent evidence in Rhode Island); *State v. Saltz*, 551 S.E.2d 240, 253 (S.C. 2001) (stating rule for South Carolina and finding corpus delicti of homicide satisfied by circumstances of victim's disappearance and the site where his body was found); *State v. Thompson*, 560 N.W.2d 535, 543–44 (S.D. 1997) (stating rule for South Dakota and finding independent evidence insufficient to establish corpus delicti of sexual contact with a minor); *State v. Smith*, 24 S.W.3d 274, 281–82 (Tenn. 2000) (stating that confession must be corroborated with slight evidence of corpus delicti and finding prior statements of sexual assault victims sufficient to establish corpus delicti in Tennessee); *Rocha v. State*, 16 S.W.3d 1, 4–5 (Tex. Crim. App. 2000) (stating rule for Texas and finding corpus delicti of robbery satisfied by testimony of independent witnesses); *State v. DeHart*, 17 P.3d 1171, 1174–77 (Utah Ct. App. 2001) (stating rule but applying exception for statements made before commission of crime in Utah); *State v. Weller*, 644 A.2d 839, 840–42 (Vt. 1994) (stating rule for Vermont and finding trial court properly decided question of whether there was sufficient corpus delicti of arson); *Cherrix v. Commonwealth*, 513 S.E.2d 642, 651 (Va. 1999) (stating rule for Virginia and finding corpus delicti of homicide, sodomy, and firearms offenses satisfied by condition of body and testimony of other witnesses); *State v. Bernal*, 33 P.3d 1106, 1107–08 (Wash. Ct. App. 2001) (stating rule for Washington and finding insufficient independent evidence to establish corpus delicti of heroin delivery); *State v. Garrett*, 466 S.E.2d 481, 491–92 (W. Va. 1995) (stating rule for West Virginia and finding corpus delicti of homicide satisfied by circumstances of victim's disappearance, testimony that defendant was later seen driving victim's truck with bloodstains on his pants, and medical testimony concerning possible bullet hole in victim's hip); and *Betzle v. State*, 847 P.2d 1010, 1021–22 (Wyo. 1993) (rejecting prosecution request to abolish rule and finding corpus delicti of sexual assault satisfied by child victim's unusual conduct and the testimony of a pediatrician who examined the child in Wyoming).

states that do retain the rule have substantially weakened its impact by finding the requirement satisfied by the most minimal independent evidence.¹⁰⁷ Mullen has also shown that courts in some corpus delicti jurisdictions have undermined the rule by adopting exceptions.¹⁰⁸

Mullen is surely correct that the last half of the twentieth century has produced "a distinct trend away from the corpus delicti rule and toward the less restrictive corroboration rule."¹⁰⁹ While Mullen and most other modern commentators applaud this trend, I shall argue in the next part of this article that the criticisms of the rule that have supported this trend are misplaced and that the rule should be retained.

IV. ANSWERING THE CRITICS: WHY THE RULE SHOULD BE RETAINED

The judicial trend against the corpus delicti rule has been accompanied, or egged on, by scholarly commentary that has been almost universally unfavorable to the rule.¹¹⁰ The criticisms of the rule fall into essentially three categories: (1) the rule is underinclusive because it does not apply to even the most unreliable confession to an actual crime; (2) the rule is overinclusive because it results in the suppression of reliable confessions; and (3) the rule is obsolete and unnecessary because constitutionally-based doctrines provide adequate safeguards against the use of unreliable confessions.

In this part, I shall set forth and answer each of these criticisms in some detail. I will then explain why the weaker "corroboration" rule adopted by the

¹⁰⁷ Mullen, *supra* note 6, at 416–17. Among other examples, Mullen cites *State v. Owens*, 359 S.E.2d 275, 278 (S.C. 1987), in which the South Carolina Supreme Court found the corpus delicti of murder satisfied by evidence that the alleged victim had disappeared suddenly and by evidence that the victim was not likely to leave voluntarily. *Id.* at 417 n.144. If such "proof" of the corpus delicti were actually sufficient to satisfy the rule, there would have been no problem admitting the confessions in *Perrys' Case* and in the case of Stephen and Jesse Boorn, the two miscarriages of justice that apparently led to the widespread adoption of the corpus delicti rule in the United States.

¹⁰⁸ *Id.* at 408–11. For example, several courts have refused to apply the rule to an "admission" falling short of a full confession, *see id.* at 409 n.106 (citing cases from three states), some courts have created a "res gestae" exception for confessions closely connected in time and place to the crime itself, *see id.* at 410 n.113 (citing cases from two states), and other courts have held that a confession to multiple crimes is admissible so long as the prosecution establishes the corpus delicti to one of the crimes, *id.* at 411 n.116 (citing cases from four states).

¹⁰⁹ Mullen, *supra* note 6, at 413.

¹¹⁰ *See, e.g., supra* note 6 and accompanying text (citing treatises and articles critical of corpus delicti rule). *But see* Margolis, *supra* note 60, at 45, 55–57 (arguing that the Supreme Court should constitutionalize the corpus delicti rule); Brian C. Reeve, *State v. Parker: North Carolina Adopts the Trustworthiness Doctrine*, 64 N.C. L. REV. 1285, 1297–301 (1986) (criticizing North Carolina Supreme Court for abolishing corpus delicti rule).

federal courts and nearly a dozen states is a hopelessly inadequate substitute for the corpus delicti rule.

A. Is the Corpus Delicti Rule Underinclusive Because It Is Inapplicable to Confessions to Actual Crimes?

One common criticism of the corpus delicti rule is that a rule intended to protect the mentally unbalanced or the coerced from the consequences of false confessions should not be limited to cases in which the prosecution cannot independently prove that a crime has occurred. As one critic put it:

The corpus delicti rule does little to protect defendants with limited mental capacity. It may offer protection to one who, briefly losing control, confesses to an imaginary crime and later recants. . . . [The rule] should not require, as it does in most jurisdictions, merely that the prosecution prove that a crime was committed by someone. One seeking punishment or notoriety . . . would more likely confess to a real, probably celebrated, crime than to a fictitious one.¹¹¹

The most obvious problem with this criticism is that it misses the point of the corpus delicti rule. The rule was never intended to suppress *all* unreliable confessions; the rule was designed only to preclude confessions to, and convictions for, *fictitious* crimes, such as the non-existent murders in *Perrys*'

¹¹¹ Mullen, *supra* note 6, at 402–03; see also *People v. McMahan*, 548 N.W.2d 199, 205 (Mich. 1996) (Boyle, J., dissenting) (“[T]he common-law corpus delicti rule provides no protection to a person of limited intelligence or an unstable person pleading guilty to a crime someone else has committed.”). In the same portion of his article, Mullen also criticizes the corpus delicti rule as irrational because it applies to uncorroborated extrajudicial confessions, but not to confessions, such as guilty pleas, made during judicial proceedings. *Id.* at 402–03. This particular criticism is difficult to understand since confessions law is largely built on the proposition that extrajudicial confessions have long been regarded as inherently more suspect than confessions freely rendered in a judicial proceeding. See, e.g., Perkins, *supra* note 60, at 177 (stating that “only the extrajudicial confession is viewed with distrust; no evidence ranks higher than the confession in open court”). Even in the nineteenth century, procedural and constitutional protections that were inapplicable to extrajudicial confessions were known to greatly enhance the reliability of confessions in judicial proceedings. See GREENLEAF, *supra* note 94, § 216, at 300–01. The author explains:

Judicial confessions are those which are made before the magistrate, or in Court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. . . . [Such confessions are] sufficient to found a conviction, even if to be followed by a sentence of death, they being deliberately made, under the deepest solemnities, with the advice of counsel, and, the protecting caution and oversight of the Judge.

Id. (emphasis omitted).

Case and in the cases of Stephen and Jesse Boom.¹¹² If the corpus delicti rule serves that narrow but laudable purpose, as it clearly does,¹¹³ it hardly seems fair to criticize the rule for not serving other worthwhile causes as well.

A second answer to this criticism is that it is perfectly rational for the law to distinguish between an extrajudicial confession to an independently verifiable crime and an extrajudicial confession to a crime that cannot be independently established. Unlike the latter confession, the former confession is automatically more reliable in at least one key respect. That is, if the crime described in a confession actually occurred, it follows that the confession describes an objective and external reality to at least some extent, a conclusion one cannot necessarily draw about a confession to a crime whose existence cannot be independently verified.

The *McAllister* case serves as a perfect example of this concept. If the autopsy of Daniel McAllister *had* revealed evidence that he had been smothered, his mother's confession would, by that fact alone, be at least somewhat reliable. Since Daniel's autopsy revealed that all of the normal physical indications of smothering were absent, Dawn McAllister's confession is highly unreliable.

The Supreme Court has drawn exactly the same type of distinction in the Fourth Amendment context. An anonymous tip containing significant and independently verifiable details may provide probable cause or reasonable suspicion justifying a seizure,¹¹⁴ while an anonymous tip lacking such verifiable details cannot normally justify any non-consensual police action.¹¹⁵ The Court

¹¹² See, e.g., *People v. Williams*, 373 N.W.2d 567, 570 (Mich. 1985) (purpose of corpus delicti rule is "to guard against, indeed to preclude, conviction for a criminal homicide when none was committed"). As Professor Perkins aptly put it, "[t]he execution of an innocent man is equally tragic no matter what caused justice to miscarry in his case, but it seems most shocking where the crime itself is found to have been nonexistent." Perkins, *supra* note 60, at 173.

¹¹³ Indeed, critics of the rule, while usually acknowledging that convictions are rarely reversed because of the corpus delicti rule, still complain that those few reversals are too many. See, e.g., Mullen, *supra* note 6, at 415 (citation omitted) ("Although reversals based on the corpus delicti rule are by no means frequent, they are common enough to constitute a significant cost of maintaining the rule."); Crisera, *supra* note 6, at 1581, 1583 (pointing out that California courts rarely exclude evidence because of the absence of proof of the corpus delicti, but complaining that the rule could "keep perfectly reliable extrajudicial confessions out of evidence"). In other words, the critics do not dispute that the corpus delicti rule is effective in suppressing confessions to fictitious offenses. Instead, their real complaint is that application of the rule might occasionally result in the exclusion of a confession to a real crime. I shall discuss and address this argument in Part IV.B, *infra*.

¹¹⁴ See, e.g., *Illinois v. Gates*, 462 U.S. 213, 243–46 (1983) (finding that probable cause was established by corroboration of an anonymous tip describing suspects' suspicious future travel plans); *Alabama v. White*, 496 U.S. 325, 330–32 (1990) (holding that reasonable suspicion was established by corroboration of an anonymous tip describing suspect's future movements).

¹¹⁵ See *Gates*, 462 U.S. at 237 (agreeing with lower court that anonymous tip without corroboration of details insufficient for probable cause); *White*, 496 U.S. at 329 (observing that

draws this common sense distinction between tipsters who provide substantial, verifiable details and tipsters who do not because if "an informant is right about some things, he is more probably right about other facts."¹¹⁶

The corpus delicti rule, then, is grounded in the similar common sense belief that an extrajudicial confession which can be verified as to one very important fact, that the crime actually occurred, is more probably right about another crucial fact, that the declarant is the one who committed the crime. Since some suspects do unquestionably confess to non-existent crimes, it is perfectly rational for the law to require the prosecutor to independently verify not just some details of the confession but that the crime mentioned in the confession actually occurred.

B. Does the Corpus Delicti Rule Exclude Reliable Confessions?

A second common criticism of the corpus delicti rule is that it excludes reliable confessions and, therefore, unjustly frees the guilty. As one critic put it, "As long as the rule exists, it can be abused to keep *perfectly reliable* extrajudicial confessions out of evidence."¹¹⁷ Another critic complained that, "Literal compliance with the corpus delicti rule sometimes results in unsuccessful prosecutions of *admittedly guilty* people, often in circumstances that highlight the absurdity of the rule."¹¹⁸

But these criticisms prove far too much. How can it be said that a confession to a crime is "perfectly reliable" if there is no independent evidence that the crime occurred? Similarly, since anyone who confesses to any crime is, by definition, "admittedly guilty," should we discard the entire body of confessions law in favor of automatic conviction upon proof of confession?

Underlying such criticisms is the premise, usually unstated, that the extrajudicial confession is an exceptionally reliable piece of evidence and that, therefore, any rule that requires the exclusion of extrajudicial confessions will produce less reliable verdicts.¹¹⁹ Of course, early proponents of the corpus delicti

anonymous tip without corroboration would not have provided reasonable suspicion); *see also*, e.g., *Florida v. J.L.*, 529 U.S. 266, 271 n.72 (2000) (holding that corroboration of an anonymous tip limited to suspects' present location and clothing was insufficient to establish reasonable suspicion).

¹¹⁶ *Gates*, 462 U.S. at 244 (quoting *Spinelli v. United States*, 393 U.S. 410, 427 (1969) (White, J., concurring)).

¹¹⁷ *Crisera*, *supra* note 6, at 1582-83 (emphasis added).

¹¹⁸ *Mullen*, *supra* note 6, at 415 (emphasis added).

¹¹⁹ At least one prominent critic of the corpus delicti rule, Professor Wigmore, has explicitly stated that assumption: "[T]he danger which [the corpus delicti rule] is supposed to guard against is greatly exaggerated in common thought. That danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare." 7 WIGMORE, *supra* note 2, § 2070, at 510 (citation omitted).

rule, such as Professor Greenleaf, proceeded from precisely the opposite premise: "evidence of verbal confessions of guilt is to be *received with great caution*." ¹²⁰

Modern scholarship and empirical evidence have shown that Professor Greenleaf's skepticism of the extrajudicial confession was justified. Professors Richard A. Leo and Richard J. Ofshe have documented and studied hundreds of modern cases in which criminal defendants confessed to crimes that they did not, or almost certainly did not, commit.¹²¹ It is impossible to document how frequently confessions are false for a variety of reasons, not the least of which is that a confession's falsity cannot be conclusively demonstrated unless the defense is fortunate enough to find incontrovertible evidence contradicting the confession.¹²² What cannot be denied, however, is that false confessions are regularly admitted into evidence and regularly lead to wrongful convictions.

The recent phenomenon of DNA exonerations has provided indisputable evidence that the false confession is one of the leading causes of wrongful conviction in the United States. Of 62 such DNA exonerations investigated by the Innocence Project as of 1999, 23% of the convictions rested, at least in part, on false confessions or admissions.¹²³

Only by accepting the demonstrably erroneous premise that false confessions are not a significant problem can one accept the critics' claim that the corpus delicti rule regularly results in the exclusion of perfectly reliable confessions. That is, to accept this criticism, one must believe that an extrajudicial confession is inherently reliable even when it cannot be corroborated to the minimal extent of establishing that the crime mentioned in the confession actually occurred.

Indeed, one critic of the corpus delicti rule, Maria Lisa Crisera, has argued exactly that: "The danger posed by the corpus delicti rule is, of course, particularly pronounced in cases in which the defendant's confession may be the

¹²⁰ GREENLEAF, *supra* note 94, § 214, at 297-98.

¹²¹ See Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135, 1139 (1997) [hereinafter Leo & Ofshe, *Missing the Forest*]; see also *id.* at 1137 n.12 (referencing a "partial list of the case examples of the numerous false confessions that have been documents [in the 1990s]"). Professor Leo and Ofshe have published numerous articles documenting the extent of the modern false confession problem. See, e.g., Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. & SOC'Y 189 (1997); Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992).

¹²² See Leo & Ofshe, *Missing the Forest*, *supra* note 121, at 1137. In addition, many false confessions are likely to go unreported since no criminal justice agency records or collects statistics about false confessions. *Id.*

¹²³ BARRY SCHECK ET AL., ACTUAL INNOCENCE 92, 263 (2000).

only available evidence of the crime committed.”¹²⁴ As an example of such a “danger,” Crisera cites *In re Flodstrom*,¹²⁵ a case strikingly similar to the *McAllister* case discussed in Part I of this article, in which the appellate court reversed a mother’s conviction for smothering her baby because there was no evidence, other than the mother’s confession, that the baby had died from criminal causes.¹²⁶ Crisera criticizes the result in *Flodstrom*:

In reaching its decision to release the defendant from custody, however, the court failed to consider that independent evidence of infanticide or child abuse by suffocation is virtually unattainable. *In such cases, a confession may well be the only evidence available.* Permitting the corpus delicti rule to prevent the trier of fact from considering such valuable evidence seems contrary to the interests of justice.¹²⁷

As discussed above, such a complaint betrays an exceptionally high degree of faith in the inherent reliability of extrajudicial confessions.¹²⁸ Crisera points to nothing in *Flodstrom* to suggest that the confession there was reliable; on the contrary, Crisera disagrees with the result in *Flodstrom* precisely because there was no evidence to corroborate the confession and, therefore, no way to uphold the defendant’s conviction.

Another corpus delicti critic, Mullen, cites five cases in support of his claim that “the corpus delicti rule sometimes results in unsuccessful prosecutions of admittedly guilty people, often in circumstances that highlight the absurdity of the rule.”¹²⁹ However, in three of those cases, Mullen, like Crisera, simply assumes that the extrajudicial confessions must have been reliable despite the total absence of corroboration,¹³⁰ while the other two cases involve apparent misapplications of the corpus delicti rule.¹³¹

¹²⁴ Crisera, *supra* note 6, at 1583.

¹²⁵ 277 P.2d 101 (Cal. Ct. App. 1954).

¹²⁶ See Crisera, *supra* note 6, at 1583 (citing *Flodstrom*, 277 P.2d at 103).

¹²⁷ *Id.* (emphasis added).

¹²⁸ If one shares Professor Wigmore’s faith that false confessions are “exceedingly rare,” it does follow immediately that the corpus delicti rule amounts to “a positive obstruction to the course of justice.” 7 WIGMORE, *supra* note 2, § 2070, at 510 (footnote omitted).

¹²⁹ Mullen, *supra* note 6, at 415. The five cases Mullen cites are: *Bray v. State*, 670 S.W.2d 822 (Ark. Ct. App. 1984); *State v. Zwierkowski*, 117 N.W.2d 179 (Mich. 1962); *Jones v. State*, 555 P.2d 63 (Okla. Crim. App. 1976); *State v. Smith*, 774 P.2d 519 (Wash. Ct. App. 1989); and *State v. Ralston*, 425 N.E.2d 916 (Ohio Ct. App. 1979).

¹³⁰ As to *Zwierkowski*, Mullen complains that the “defendant’s confession to breaking and entering at night was held inadmissible where independent evidence failed to show that the burglary occurred at night.” Mullen, *supra* note 6, at 415 (footnote omitted). But Mullen provides no reason to believe that the confession was reliable as to that, or any other, detail. See *id.* As to *Jones*, Mullen writes that the defendant’s “conviction of assault with intent to commit a felony was reduced to mere assault and battery because only the defendant’s confession

Since the claim that the corpus delicti rule frustrates the ends of justice is a serious charge, one should expect the critics to support that claim with impressive empirical evidence showing that the rule so frequently frees the guilty that its costs outweigh any protection it provides to the innocent. On the contrary, none of the modern critics of the rule has documented a single case in which proper application of the rule resulted in the exclusion of a demonstrably reliable extrajudicial confession. By contrast, the *McAllister* case, discussed in Part I of this article, demonstrates that the proper application of the corpus delicti rule can save an almost certainly innocent defendant from a lifetime in prison.

There is, of course, no denying that the application of the corpus delicti rule might occasionally result in a guilty defendant going free.¹³² But exactly the same can be said of the constitutional requirement that the prosecution prove all of the

revealed his intent to kidnap.” *Id.* (footnote omitted). Once again, Mullen does not explain why the defendant’s confessed intent to kidnap should be considered reliable in the absence of any evidence corroborating that intent. Finally, Mullen complains that in *Ralston*, the defendant’s “murder conviction was reversed even though the defendant took police to the site where he had deposited the victim’s remains, because there was no independent evidence as to the cause of death.” *Id.* (footnote omitted). Also, Mullen does not explain why the defendant’s confession should be considered reliable enough to support a murder conviction even when the forensic evidence cannot corroborate it. *See id.* The fact that the defendant disposed of a body does not prove that the decedent was murdered.

¹³¹ About *Bray*, Mullen writes that the defendant “confessed orally and in writing to having set fire to a building,” but “his conviction of first degree criminal mischief was reversed for want of independent proof of incendiary origin. The prosecution failed to overcome the presumption of accident, even though there was evidence that the fire started in *two* places.” Mullen, *supra* note 6, at 415 (emphasis added) (footnote omitted). Since evidence that a fire started in two places unquestionably would corroborate a confession to starting a fire, *Bray* simply appears to be wrongly decided. Similarly, Mullen complains about *Smith* that the defendant’s

conviction for attempted murder was reversed because the evidence *aliunde* the confession only established a plan to murder rather than a ‘substantial step’ taken toward commission of the crime—notwithstanding that the defendant was found with a knife strapped to his leg, in possession of numerous other weapons, and with a bag of lime in his car.

Id. at 415 (footnote omitted). Once again, since the cited independent evidence clearly corroborates the defendant’s confession that a substantial step had been taken, the case appears to be wrongly decided.

¹³² Even the harshest critics of the rule grudgingly admit that the rule is seldom successfully invoked. *See* Crisera, *supra* note 6, at 1583 (admitting that “only a few appellate courts have found insufficient independent evidence of the corpus delicti and consequently excluded extrajudicial statements,” but pointing out that more confessions may have been excluded at the trial court level and that charges may not have been brought because of corpus delicti problems); Mullen, *supra* note 6, at 415 (“Although reversals based on the corpus delicti rule are by no means frequent, they are common enough to constitute a significant cost of maintaining the rule.”).

elements of the offense beyond a reasonable doubt.¹³³ That is, if the prosecution were required only to prove some of the elements beyond a reasonable doubt or to prove all of the elements to a preponderance, there is no doubt that fewer guilty people would escape punishment. We are willing to accept that cost because of the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”¹³⁴ Since the corpus delicti rule, like the high burden of proof in criminal cases, is designed to prevent conviction of the innocent, the criticism that the rule might occasionally result in the freeing of the guilty is simply insufficient to justify its abolition.

C. Have Constitutional Confession Doctrines Rendered the Corpus Delicti Rule Superfluous?

The most serious criticism of the corpus delicti rule is that the rule is no longer necessary because modern constitutional doctrines protect against the admission of unreliable confessions. Professor McCormick, for example, has written, “[g]iven the development of other confession law doctrines, especially Fifth Amendment protections as promulgated in *Miranda* and the voluntariness requirement, concerns regarding law enforcement interrogation practices do not provide significant support for the corroboration requirement.”¹³⁵ Other scholarly and judicial critics of the rule have echoed McCormick’s argument.¹³⁶

In this section, I shall show that the due process voluntariness doctrine and *Miranda* are each insufficient to overcome the concerns that justify the existence of the corpus delicti rule. In particular, I shall demonstrate that these modern constitutional confession doctrines provide the least protection to the class of persons—mentally ill suspects such as Dawn McAllister—who most need the corpus delicti rule.

¹³³ See *In re Winship*, 397 U.S. 358, 364 (1970) (explaining that due process requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged”).

¹³⁴ *Id.* at 372 (Harlan, J., concurring).

¹³⁵ 1 MCCORMICK ON EVIDENCE, *supra* note 6, § 145, at 563.

¹³⁶ See, e.g., Goldenberg, *supra* note 6, at 622 (noting arguments that the “corpus delicti rule has outlived its usefulness” in light of *Miranda* and other protections); Mullen, *supra* note 6, at 404 (arguing that corpus delicti rule’s rationale of excluding involuntary confessions “has been dissipated by United States Supreme Court decisions limiting the admissibility of questionable confessions”); *People v. McMahan*, 548 N.W.2d 199, 204 (Mich. 1996) (Boyle, J., dissenting) (“To the extent that the reason for the rule was to avoid reliance on unreliable confessions, or to protect the mentally unstable, its utility has been met and surpassed by protections afforded under the constitutionalization of criminal procedure and other statutory guarantees.”); *State v. Parker*, 337 S.E.2d 487, 495 (N.C. 1985) (corpus delicti rule unnecessary since *Miranda* and the voluntariness doctrine provide adequate protection).

1. *Due Process Voluntariness*

The Supreme Court first developed the due process voluntariness doctrine nearly seventy years ago in order to address the perceived problem of coercive police interrogation practices.¹³⁷ Nearly from the outset, however, the Court recognized that the voluntariness doctrine was no substitute for the requirement that a confession be corroborated:

Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made¹³⁸

In the 1960s, however, the Court did use the voluntariness doctrine on at least two occasions to exclude confessions extracted from precisely the type of weak-minded or mentally ill defendants the corpus delicti rule is designed to protect. In *Blackburn v. Alabama*,¹³⁹ the Court set forth in detail the defendant's lengthy history of severe mental illness in the years before and after his confession to a robbery.¹⁴⁰ In finding Blackburn's confession involuntary, the Court stressed that he was "insane and incompetent"¹⁴¹ at the time of the confession and, in sweeping language that seemed to rule out the possibility of ever admitting statements from such mentally ill suspects, observed:

Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a

¹³⁷ The Court first announced the doctrine in *Brown v. Mississippi*, 297 U.S. 278, 286 n.87 (1936). In *Brown*, the Court excluded the confession of a black defendant who had been bullwhipped by a deputy until he confessed to a murder. *Id.* at 286–87.

¹³⁸ *Smith v. United States*, 348 U.S. 147, 153 (1954) (citations omitted). The *Smith* Court went on to affirm the admission of Smith's confession by applying the corroboration requirement, the weakened version of the corpus delicti rule that the Court had endorsed in the companion case of *Opper v. United States*, 348 U.S. 84 (1954). *Smith*, 348 U.S. at 156–59.

¹³⁹ 361 U.S. 199 (1960).

¹⁴⁰ Blackburn had been discharged from the United States Army after being diagnosed as disabled by a psychosis. *Id.* at 200. After he had been institutionalized for four years, Blackburn failed to return to the mental hospital from a ten-day leave, and the robbery was committed a short time later. *Id.* at 200–01. After his arrest, Blackburn was committed to the mental hospital for more than four years until he was finally declared competent to stand trial. *Id.* at 201–02.

¹⁴¹ *Id.* at 207.

statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.¹⁴²

While the Court observed that the circumstances under which the interrogation had been extracted were relevant—Blackburn had been confined in a small room filled with police officers for eight or nine hours—those circumstances simply made the “chances of the confession’s having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.”¹⁴³

Three years later, in *Townsend v. Sain*,¹⁴⁴ the Court held that the voluntariness doctrine would bar the admission of a confession obtained from a suspect under the influence of a drug that allegedly acted as a “truth serum,” even if the police officers who had questioned the suspect had no idea that the suspect was drugged:

It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine’s properties as a “truth serum,” if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible. . . . [I]n *Blackburn v. Alabama*, we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.¹⁴⁵

If *Blackburn* and *Townsend* had been the last word on the subject, critics of the corpus delicti rule would have a point. The due process voluntariness doctrine, as set forth in those two decisions, seemed to preclude the admission of statements from insane or intoxicated defendants even if the police had done nothing wrong in obtaining those statements. Since persons in such mental states are the most likely to confess to imaginary crimes without any coercion at all, a constitutional doctrine flatly prohibiting the admission of such statements would, in fact, make the corpus delicti rule largely unnecessary.

Unfortunately, *Blackburn* and *Townsend* turned out not to be the last word on the admissibility of confessions from the mentally unfit. Nearly a quarter century

¹⁴² *Id.*

¹⁴³ *Id.* at 208.

¹⁴⁴ 372 U.S. 293 (1963).

¹⁴⁵ *Townsend*, 372 U.S. at 308–09 (footnote and citation omitted).

after *Townsend*, the Court radically reinterpreted *Blackburn* and *Townsend* in *Colorado v. Connelly*.¹⁴⁶

Although *Connelly* is a due process voluntariness case, the fact pattern sounds like a classic corpus delicti scenario. One day in 1983, Francis Connelly, who had long suffered from chronic paranoid schizophrenia,¹⁴⁷ suddenly heard the "voice of God."¹⁴⁸ Following "God's" orders, Connelly withdrew money from a bank, purchased an airplane ticket, flew from Boston to Denver, walked up to a police officer at the Denver airport, and confessed to having murdered a young girl, Mary Ann Junta, in Denver nine months earlier.¹⁴⁹ After being arrested and advised of his *Miranda* rights, Connelly repeated his confession at police headquarters and agreed to take the officers to the scene of the supposed killing.¹⁵⁰ When he was interviewed by a public defender the following day, Connelly became visibly disoriented and confused.¹⁵¹ After being sent to a state hospital for evaluation, he was found incompetent to stand trial.¹⁵²

There was very little reason to believe that Connelly's confession described an actual murder. By checking their records, the Denver police discovered that an unidentified woman's body had been found in April 1983, five months after Connelly supposedly murdered young Mary Ann Junta, but there was no evidence in the record that the body was Junta.¹⁵³ There also was no evidence in the record that the location described by Connelly was the place where the unidentified body had been found, nor was there any physical evidence linking Connelly to any crime.¹⁵⁴ As Justice Brennan put it, "[t]here is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly's confession."¹⁵⁵

¹⁴⁶ 479 U.S. 157 (1986).

¹⁴⁷ *Id.* at 174 (Brennan, J., dissenting). The record indicated that Connelly had been hospitalized for psychiatric reasons five times, including one stay lasting seven months. *Id.*

¹⁴⁸ *Id.* at 161. As Justice Brennan noted in his dissent, Connelly also believed that his father was God and that he was a reincarnation of Jesus Christ. *Id.* at 174 (Brennan, J., dissenting).

¹⁴⁹ *Id.* at 160–61.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 161.

¹⁵² *Id.* Seven months later, however, the physicians treating Connelly reversed that evaluation and concluded that he was competent to stand trial. *Id.* As Justice Brennan observed in dissent, Connelly became competent only after being treated with antipsychotic and sedative medications. *Id.* at 175 (Brennan, J., dissenting). At the time of his confession, Connelly had been off of his antipsychotic medication for at least six months. *Id.* at 174.

¹⁵³ *Id.* at 160; *see also id.* at 183 (Brennan, J., dissenting).

¹⁵⁴ *Id.* at 183 (Brennan, J., dissenting).

¹⁵⁵ *Id.*

The state trial court, relying in part on *Townsend v. Sain*,¹⁵⁶ concluded that Connelly's statements were not the product of his free will and were, therefore, involuntary within the meaning of the Due Process Clause.¹⁵⁷ The Colorado Supreme Court agreed and accordingly affirmed the suppression of all of Connelly's statements.¹⁵⁸

The Supreme Court reversed in an opinion by Chief Justice Rehnquist that completely recast *Townsend* and *Blackburn* so as to require an insane or mentally incompetent defendant to establish "the integral element of police overreaching" in order to win an involuntariness claim.¹⁵⁹ According to the Court in *Connelly*, it was not Blackburn's insanity that made his confession involuntary; it was the fact that the police exploited that insanity by a lengthy interrogation in a small room filled with police officers.¹⁶⁰ Similarly, the *Connelly* majority explained, it was not the fact that Townsend was under the influence of a drug with the properties of a "truth serum" that made his confession involuntary; it was the fact that he was given the drug by a police doctor and interrogated by officers who supposedly knew of the drugging.¹⁶¹

Having transformed *Blackburn* and *Townsend* into police misconduct cases,¹⁶² the Court went on to derive a rigid rule that "coercive police activity is a

¹⁵⁶ 372 U.S. 293 (1963).

¹⁵⁷ *Connelly*, 479 U.S. at 162.

¹⁵⁸ *People v. Connelly*, 702 P.2d 722, 728-29 (Colo. 1985).

¹⁵⁹ *Connelly*, 479 U.S. at 164.

¹⁶⁰ *Id.* at 164-65. This reading of *Blackburn* is, of course, diametrically opposed to the explanation of *Blackburn* in *Townsend*:

[I]n *Blackburn v. Alabama*, we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.

Townsend, 372 U.S. at 309 (footnote and citation omitted). The failure of the *Connelly* majority to even mention the *Townsend* Court's interpretation of *Blackburn* is striking.

¹⁶¹ *Connelly*, 479 U.S. at 165. As with *Blackburn*, it is impossible to square this reading of *Townsend* with the actual language of the case. *Townsend* could not have been more clear that it did not matter whether the doctor or the interrogating officers knew that Townsend was under the influence of a "truth serum":

It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum," if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible.

Townsend, 372 U.S. at 308 (footnote omitted).

¹⁶² For a strong criticism of the Court's revision of *Blackburn* and *Townsend*, see Alfredo Garcia, *Mental Sanity and Confessions: The Supreme Court's New Version of the Old "Voluntariness" Standard*, 21 AKRON L. REV. 275, 277-80 (1988).

necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."¹⁶³ As for the fact that any statement from a person such as Connelly would be highly unreliable, the Court dismissed this concern in a single sentence: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, *but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment.*"¹⁶⁴ Since it was the "voice of God," not the police, who coerced Connelly into confessing, the Court concluded that the admission of his statements did not violate the Due Process Clause no matter how mentally ill he was and no matter how unreliable his statements were.¹⁶⁵

Thus, *Connelly* makes it perfectly clear that the due process voluntariness doctrine is not a substitute for the corpus delicti rule. First, the due process voluntariness doctrine provides no protection at all for a mentally ill, intoxicated, or weak-minded suspect who confesses to an imaginary crime unless the government somehow coerced the suspect into confessing.

Second, *Connelly* flatly contradicts the corpus delicti critics' argument that the due process voluntariness doctrine is sufficient to keep out unreliable confessions. On the contrary, in the language highlighted above, the Court held that the reliability of a confession is not a constitutional concern at all.¹⁶⁶ Instead, the Court concluded that the evidentiary law of the forum, such as the corpus delicti rule, is the only check on the admission of unreliable confessions.

Dawn McAllister's case provides a good example of how *Connelly* has rendered the voluntariness doctrine ineffective to protect the mentally ill against convictions based on unreliable confessions to fictitious crimes. McAllister came to the attention of the Michigan State Police during her seventh institutionalization after she told her psychiatrist that she had been a member of a baby-sacrificing Satanic cult.¹⁶⁷ She had also told wildly implausible stories to police officers, a minister, and several other psychological professionals.¹⁶⁸ She was interrogated by a detective who had completed doctoral level training in psychology and who was known for using psychological tactics, including

¹⁶³ *Connelly*, 479 U.S. at 167.

¹⁶⁴ *Id.* (emphasis added) (citation omitted).

¹⁶⁵ *See id.*

¹⁶⁶ It is debatable whether it is true that voluntariness cases before *Connelly* were not concerned with the reliability of the confession. *See* George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 272-76 (1988) (arguing that the *Connelly* rejection of reliability as a relevant factor in constitutional analysis is surprising and unjustified); Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 959-60 (1997) (arguing *Connelly* correctly recognized reliability irrelevant to constitutional analysis).

¹⁶⁷ *See supra* notes 30-33 and accompanying text.

¹⁶⁸ *See supra* notes 36-39 and accompanying text.

hypnosis, during interrogations.¹⁶⁹ She finally confessed after the detective told her that she had killed her baby and even helpfully suggested the motive.¹⁷⁰ She repeated that confession to her cellmates and then steadfastly denied it.¹⁷¹

Despite all of this, there is almost no chance that an appellate court would have excluded any of McAllister's statements as involuntary. When McAllister made her statement to the police, she was not in custody and she had been interrogated less than two hours.¹⁷² Since the interrogation was not recorded, the only evidence of what actually happened during that session came from McAllister, the interrogating detective, and another detective who watched the interrogation over closed circuit television.¹⁷³ After the two detectives testified that they did not overreach or abuse McAllister in any way, the trial court found her statement to be voluntary.¹⁷⁴

In other words, Dawn McAllister's police interrogation was just like Francis Connelly's. It does not matter that McAllister and Connelly both had histories of severe mental illness or that they had both heard voices telling them that they had committed terrible crimes. It does not matter that the resulting statements are completely unreliable and unverifiable. All that matters for the statement to be admissible under the voluntariness test is that there be no evidence of police "overreaching."

McAllister's alleged statement to her cellmates also would not have been excludable after *Connelly*, despite McAllister's mental illness, because those statements were not made to governmental agents. Once again, her mental state makes no difference at all in the due process voluntariness test.

In short, both of McAllister's inculpatory statements would have been certainly admissible under the due process voluntariness doctrine. That doctrine would not have protected her from the consequences of her unreliable statements.

The claim that the corpus delicti rule is unnecessary because the due process voluntariness doctrine is sufficient to keep unreliable confessions from mentally incompetent suspects out of evidence is indefensible after *Connelly*. Connelly and McAllister were both severely mentally ill, both made statements that were highly unreliable, and there was no independent proof that the murders to which they confessed had occurred. Since, as the Court held, the admission of Connelly's statements did not violate the Due Process Clause, no critic of the corpus delicti rule should seriously argue that the voluntariness doctrine is an adequate substitute for the rule.

¹⁶⁹ See *supra* notes 40–42 and accompanying text.

¹⁷⁰ See *supra* notes 46–48 and accompanying text.

¹⁷¹ For a detailed description of the circumstances leading up to and surrounding McAllister's statements, see *supra* note 51 and accompanying text.

¹⁷² See *supra* notes 43–45 and accompanying text.

¹⁷³ See *supra* note 44 and accompanying text.

¹⁷⁴ Suppression Hearing, Transcript at 89, *People v. McAllister*, No. 92-6589-FC (Shiawassee, Mich. Cir. Ct. June 5, 1992).

2. *Miranda*

Contrary to the claims of some courts,¹⁷⁵ *Miranda* also provides almost no protection at all to the persons for whom the corpus delicti rule is primarily aimed. First, *Miranda* applies only to those suspects in "custody."¹⁷⁶ It is not enough that the suspect has been briefly detained¹⁷⁷ or that the encounter occurred at the police station.¹⁷⁸ Therefore, *Miranda* is inapplicable when, for example, a mentally disturbed person such as Francis Connelly walks up to a police officer and confesses to a crime.¹⁷⁹ Even if, as in Dawn McAllister's case, the defendant is the focus of a police investigation and is being interrogated at the police station, she is not entitled to *Miranda* warnings unless she has actually been taken into custody.¹⁸⁰

Second, *Miranda* applies only if the defendant is in custody in a "police dominated atmosphere."¹⁸¹ Therefore, even if the defendant is in custody, *Miranda* will not affect the admissibility of a confession made to a private party or even to a police officer if the defendant mistakenly believed the officer was a private party.¹⁸² Thus, *Miranda* would not keep out the statements Dawn McAllister made to her cellmates just after she was arrested even though she was in custody at the time.

Third, even if the defendant is in custody in a police dominated atmosphere, *Miranda* does not apply unless the police subject the defendant to

¹⁷⁵ See, e.g., *State v. Parker*, 337 S.E.2d 487, 494 (N.C. 1985) (expressing concerns underlying the corpus delicti rule that confession may have been induced by abusive police tactics "have been undercut by the principles enunciated in *Miranda v. Arizona*").

¹⁷⁶ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (setting forth custody requirement).

¹⁷⁷ See generally *Berkemer v. McCarty*, 468 U.S. 420, 437-38 (1984) (describing that defendant detained briefly during traffic stop was not in custody for purposes of *Miranda*).

¹⁷⁸ See, e.g., *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (finding no custody where defendant voluntarily accompanied police to stationhouse).

¹⁷⁹ See *Colorado v. Connelly*, 479 U.S. 157, 169 n.3 (1986) (holding that the *Miranda* custody requirement was satisfied only when the police officer handcuffed the individual—a paranoid schizophrenic suspect with command auditory hallucinations who had approached officer and confessed to murder).

¹⁸⁰ See generally *Beheler*, 463 U.S. at 1125 (finding no *Miranda* violation where defendant voluntarily at police station interrogated without warnings or waiver); *Stansbury v. California*, 511 U.S. 318, 324-25 (1994) (per curiam) (noting that the officer's subjective intent to take defendant into custody was irrelevant to *Miranda*).

¹⁸¹ *Miranda*, 384 U.S. at 445.

¹⁸² See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 296-98 (1990) (holding *Miranda* inapplicable where jailed defendant questioned by undercover police officer posing as fellow jail inmate).

"interrogation."¹⁸³ A mentally ill or intoxicated suspect, therefore, who volunteers a confession while in police custody receives no protection at all from *Miranda*. Of course, such a suspect is far more likely to blurt out a confession than a sane and sober suspect.

Finally, and most importantly, even if *Miranda* does apply, it only requires the police to warn the suspect and obtain a waiver before proceeding with the interrogation. However, only a small minority of suspects invoke *Miranda* and refuse to talk.¹⁸⁴ *Miranda* warnings are especially unlikely to deter a mentally impaired suspect who is perfectly willing to confess to imaginary crimes. *Miranda* will not protect such a suspect from custodial police interrogation (even assuming that the police need to interrogate to obtain an incriminating statement) so long as she has the mental capacity to "voluntarily, knowingly and intelligently"¹⁸⁵ waive her *Miranda* rights, a standard so low that courts routinely uphold *Miranda* waivers from the mentally retarded and the very young.¹⁸⁶

The Supreme Court made it clear in *Colorado v. Connelly*¹⁸⁷ that the suspect's mental incapacity is no barrier to an effective *Miranda* waiver. In *Connelly*, the Court not only held voluntary the statements the paranoid schizophrenic defendant, acting on commands from the "voice of God," made to the police before he was taken into custody;¹⁸⁸ the Court went on to hold that the statements he made after the police arrested, *Mirandized*, and interrogated him were admissible as well. In response to Connelly's claim that his *Miranda* waiver was invalid because his severe mental illness made him incapable of voluntarily relinquishing his rights, the Court held that a *Miranda* waiver is *always* voluntary so long as there is no evidence of "police overreaching."¹⁸⁹

¹⁸³ See *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (defining "interrogation" for *Miranda* purposes as direct questioning or other actions that a reasonable police officer should know are likely to "elicit an incriminating response").

¹⁸⁴ See, e.g., Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 860 (1996) (finding that 12.1% of felony suspects invoked their *Miranda* rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275-76 (1996) (finding an invocation rate of 21.7%).

¹⁸⁵ *Miranda*, 384 U.S. at 444.

¹⁸⁶ See, e.g., *State v. Cleary*, 641 A.2d 102, 113 (Vt. 1994) (upholding *Miranda* waiver from retarded defendant with IQ of 65); *People v. Abraham*, 599 N.W.2d 736, 743 (Mich. Ct. App. 1999) (upholding *Miranda* waiver from eleven year old child).

¹⁸⁷ 479 U.S. 157 (1986).

¹⁸⁸ See *supra* notes 146-66 and accompanying text for a discussion of the voluntariness issue in *Connelly*.

¹⁸⁹ See *Connelly*, 479 U.S. at 170:

The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word. . . . *Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that.

In sum, those suspects likely to confess to wholly fictitious crimes receive no meaningful protection from *Miranda*. So long as the police avoid taking such a suspect into custody, *Miranda* does not come into the picture at all. Even if the police do arrest the suspect, *Miranda* provides no barrier against interrogation, regardless of the suspect's mental state or the farfetched nature of her confession, so long as the police can obtain a *Miranda* waiver without having to resort to coercion. Especially after *Connelly*, *Miranda* provides no more effective protection against confessions to imaginary crime than does the due process voluntariness doctrine.

D. Why a Corroboration or Trustworthiness Requirement Cannot Substitute for the Corpus Delicti Rule

Those jurisdictions that have abolished the corpus delicti rule have replaced it with "corroboration" or "trustworthiness" requirements.¹⁹⁰ In *Opper v. United States*,¹⁹¹ by far the most influential of such corroboration cases, the Supreme Court rejected the corpus delicti rule but held that the prosecution must introduce some independent evidence corroborating a confession that would "tend to establish the trustworthiness of the statement."¹⁹² In a companion case to *Opper*, the Court explained that the prosecution could meet that requirement by introducing independent evidence to "bolster the confession itself and thereby prove the offense 'through' the statements of the accused."¹⁹³ The states that have since abolished the corpus delicti rule have directly adopted the *Opper* corroboration requirement or some functional equivalent.¹⁹⁴

While a few hardcore critics of the corpus delicti rule may prefer to eliminate all corroboration requirements,¹⁹⁵ most support the recent trend of replacing the corpus delicti rule with an *Opper*-type standard.¹⁹⁶ Scholars and courts endorsing the *Opper* standard usually claim that a corroboration or trustworthiness requirement is sufficient to exclude the types of unreliable confessions that motivated the development of the corpus delicti rule in the first place.¹⁹⁷

¹⁹⁰ See *supra* notes 99–103 and accompanying text.

¹⁹¹ 348 U.S. 84 (1954).

¹⁹² *Id.* at 93.

¹⁹³ *Smith v. United States*, 348 U.S. 147, 156 (1954).

¹⁹⁴ See *supra* note 103.

¹⁹⁵ See, e.g., Mullen, *supra* note 6, at 418 ("All forms of the corpus delicti rule should be abolished, including the corroboration requirement.").

¹⁹⁶ See, e.g., 1 MCCORMICK ON EVIDENCE, *supra* note 6, §145, at 559–60 (endorsing the *Opper* standard); Crisera, *supra* note 6, at 1594–97 (arguing California should replace corpus delicti rule with *Opper* standard).

¹⁹⁷ See, e.g., 1 MCCORMICK ON EVIDENCE, *supra* note 6, §145, at 560 ("The major advantage of the trustworthiness approach is that it provides some protection against conviction on the basis of inaccurate confessions while avoiding serious problems involved in the *corpus*

Unfortunately, nothing could be further from the truth. As a matter of both theory and empirical practice, the corroboration requirement actually provides no protection at all to those likely to confess to fictional crimes.

On a theoretical level, the fundamental problem with the *Opper* corroboration rule is that it is so malleable that almost *any* independent evidence of *anything* can serve to “corroborate” the confession or make it “trustworthy.” Unlike the corpus delicti rule, which requires the prosecution to introduce independent evidence to show that the crime actually occurred, the independent evidence required under the corroboration rule can be used to bolster almost any aspect of the confession, including obvious and uncontroverted facts unrelated to whether the crime occurred at all.¹⁹⁸

A few examples of cases from those states that have adopted a corroboration standard demonstrate just how expansive the standard really is. The District of Columbia Court of Appeals held that a defendant’s completely unsupported confession to sodomizing a particular decedent satisfied the *Opper* standard primarily because there was evidence that he had also confessed to another act of sodomy with a different decedent whose body was found in a position that was consistent with anal intercourse.¹⁹⁹ The New Hampshire Supreme Court recently found a defendant’s confession to illegally driving a vehicle sufficiently corroborated, even though there was no other evidence that he drove the vehicle and his girlfriend testified that she was the driver, because the testimony of other witnesses contradicted certain other aspects of the girlfriend’s testimony.²⁰⁰ The Oklahoma Court of Criminal Appeals twice found confessions sufficiently corroborated largely because the defendants confessed more than once.²⁰¹ The Wisconsin Supreme Court found an especially dubious murder confession sufficiently corroborated because more than one police officer overheard it.²⁰²

delicti formulation.”); *State v. Parker*, 337 S.E.2d 487, 494 (N.C. 1985) (the trustworthiness doctrine “provides greater assurance against the use of an unreliable confession”).

¹⁹⁸ See, e.g., *State v. Urie*, 437 P.2d 24, 26 (Idaho 1968) (holding “slight corroboration will suffice” to admit confession even if corroboration does not establish any elements of the corpus delicti).

¹⁹⁹ *Adams v. United States*, 502 A.2d 1011, 1022–23 (D.C. 1986).

²⁰⁰ *State v. Miller*, 765 A.2d 693, 695–96 (N.H. 2001).

²⁰¹ See *Tilley v. State*, 963 P.2d 607, 612 (Okla. Crim. App. 1998) (finding defendant’s confession to murder sufficiently corroborated despite inconclusive autopsy results because, among other factors, defendant allegedly confessed on several occasions); *Fontenot v. State*, 881 P.2d 69, 78 (Okla. Crim. App. 1994) (finding defendant’s confession sufficiently corroborated largely because he allegedly repeated it to a friend and a jailhouse informant).

²⁰² *Holt v. State*, 117 N.W.2d 626, 632–34 (Wis. 1963). In *Holt*, the defendant was convicted of murdering her newborn baby, whose body was found burned in a furnace. There was, however, no medical evidence or any other type of evidence, apart from Ms. Holt’s confession to the police, to establish that the baby had been born alive. Thus, Ms. Holt’s confession would have been clearly inadmissible if the Wisconsin Supreme Court had applied the corpus delicti rule.

As these cases demonstrate, the *Opper* standard has no real content. If a court applying that standard wants to admit a confession, it can always point to something that “corroborates” the confession or otherwise makes the confession “trustworthy.” It should come as no surprise, therefore, that the appellate courts in those states that have rejected the corpus delicti rule virtually never find that a confession should have been excluded under the *Opper* standard, unless such a finding would make no real difference in the outcome of the case.²⁰³

Dawn McAllister’s case illustrates the impotence of the *Opper* standard. If McAllister had been prosecuted in one of the states that follows that standard, the prosecution could have argued, almost certainly successfully, that her confession was sufficiently corroborated and trustworthy because she had confessed to killing other children in Satanic rituals, two officers overheard her confession at the police station, and she repeated her confession to her cellmates in jail. That is, if McAllister lived in a state that had rejected the corpus delicti rule, she probably would still be serving a life sentence today.

The corpus delicti rule, for all of its limitations, has the distinct advantage of being a bright line rule. It is not enough for the prosecution to corroborate some aspects of the confession or to point to some facts that allegedly make the confession trustworthy. The prosecution must instead show that the crime to which the defendant confessed actually occurred. Since it is a bright line rule, the corpus delicti rule is difficult to evade or manipulate; if, as in Dawn McAllister’s case, there is no independent evidence that the crime occurred, the confession is strictly inadmissible.

The *Opper* rule provides no real standards and no real protections to people like Dawn McAllister. It is, therefore, an inadequate substitute for the corpus delicti rule.

²⁰³ I am aware of only four published state appellate decisions finding confessions insufficiently corroborated under an *Opper*-type standard: *State v. Harrell*, 386 S.E.2d 103, 107 (N.C. Ct. App. 1989) (finding insufficient evidence to corroborate defendant’s admission that uninsured vehicle was “his” where police investigation revealed vehicle actually belonged to another person); *Cannon v. State*, 904 P.2d 89, 102 (Okla. Crim. App. 1995) (finding insufficient corroboration of defendant’s statement that defendant aided commission of rape and sodomy); *Littlejohn v. State*, 989 P.2d 901, 911–12 (Okla. Crim. App. 1998) (finding insufficient corroboration of defendant’s confession to two murders used as aggravating circumstances during penalty phase of capital trial); *Barth v. State*, 132 N.W.2d 578, 579–80 (Wis. 1965) (finding insufficient evidence to corroborate defendant’s admission to homosexual acts). In *Harrell* and *Cannon*, the defendants received no real benefit from the decisions since the appellate courts in both cases upheld more serious convictions. In *Littlejohn*, the appellate court’s ruling did not affect the defendant’s conviction but did require a new sentencing hearing. Thus, only the defendant in *Barth* actually had his principal conviction overturned. One need not be terribly cynical to observe that the only defendant to receive this substantial benefit under the *Opper* rule had been convicted and imprisoned for the victimless “crime” of engaging in homosexual conduct.

V. CONCLUSION

The corpus delicti rule has proven to be a valuable safeguard against wrongful convictions in a small but important group of cases in which suspects have confessed to wholly fictitious crimes. Contrary to the claims of the critics who have urged courts to abolish the rule, constitutionally-based confession doctrines do not and cannot serve the same function.

Even conceding the critics' argument that the corpus delicti rule occasionally allows guilty defendants to escape justice, that result can only occur in cases in which the prosecution's evidence is so weak that any conviction would be unreliable. Like the proof beyond a reasonable doubt standard, the need for reliable convictions justifies the possibility that some guilty persons may go free.

What is indisputable is that the corpus delicti rule does provide a clear standard that protects some vulnerable defendants against wrongful convictions for fictitious crimes. For that reason alone, it is a rule worth retaining.